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Beginning of The End for The Smith Act?

The scene when the Supreme Court opened this year was the familiar one. The same gray heads and black gowns filed in among the same marble pillars and red velvet hangings. The Chief Justice made his immense kindliness felt even in the routine formality of greeting the lawyers newly admitted to the bar. When argument began, Mr. Justice Frankfurter was as irrepressibly ebullient as ever and Mr. Justice Harlan was again impressive in the pointed clarity of his questions. Mr. Justice Minton sat there for the last time, ill and impatient for retirement. Of the dissenters on the Court's far left, the youthful Mr. Justice Douglas seemed his old amused almost cynical self, while Mr. Justice Black growled occasionally from his lair in the lowest seat at the bench, almost invisible, often inaudible, but as inexorable as conscience, the same First Amendment fundamentalist, determined as ever to hang on until the tide turned.

The Court demonstrated, within the first three days, that the turn evident last term in such decisions as *Slochower* and *Nelson* was about to take on momentum. The Court is no longer refusing to hear the hard ones; the grant of a hearing to *Watkins, Gold* and *Sweezy* showed at once that the Warren court unlike Vinson's would not back away from politically explosive cases. But the dramatic evidence that a fresh wind was blowing through that formal hall and those sometimes formal minds came when the Court reached the Smith Act appeals, the first to be heard since the original *Dennis* case was argued in December, 1950.

Freedom of Press An Issue

Four different Smith Act prosecutions were before the Court: the fourteen Communists convicted in California and the five convicted in Pittsburgh of "conspiracy to advocate"; the two convictions for "membership"—Scales in North Carolina, Lightfoot in Illinois. Heard with them was an appeal from the heavy penalties for contempt imposed on one California defendant, Oleta O'Connor Yates, for refusing time after time to identify other persons as Communists. Within the framework of the California cases, the Court also heard two separate issues. Augustin Donovan, a leader of the California bar, argued that freedom of the press was endangered by the kind of evidence utilized against the two California defendants who are Communist newspapermen. California's one time Attorney General, Robert W. Kenny, argued that the evidence and the issues in the conviction of one California defendant, William Schneiderman, had already been settled in his favor by the Supreme Court thirteen years ago when Wendell Willkie successfully argued against Schneiderman's denaturalization.

Even before the historic climax on Wednesday afternoon when the Court 6-3 reversed all five Pittsburgh convictions and remanded them for a new trial, the tenor of questions from the bench indicated a new atmosphere and held little comfort for the government. Not only the Schneiderman case but the spurious solemnity of all the Smith Act prosecutions were considerably deflated by a wry question from Mr. Justice Frankfurter. When Judge Kenny was explaining that one of the government informers had testified that he quit the Communist party in Leftist disgust because of Schneiderman's reformist leanings, Mr. Justice Frankfurter asked, "You mean the evidence showed he was soft on Communism?" Schneiderman's plea that his Smith Act conviction should be reversed under the doctrines of *res judicata* and *collateral estoppel* (i.e. as already decided by the Court in his favor last time) was given impetus by a question from Mr. Justice Harlan. He asked government counsel whether Schneiderman could have been convicted this time without the use of the evidence on which the Supreme Court had already passed in 1943 and got a spontaneous answer, "I think not", which survived subsequent efforts to qualify it.

A New Trial in California, Too?

It looks as if there is a good chance that the Schneiderman conviction may be reversed and the other California cases remanded for a new trial. The crucial weakness of the California prosecution seems to have been the extraordinary refusal of the trial judge to instruct the jury that there had to be some evidence of "incitement" though such an instruction was requested by the government as well as the defense. It was amusing to hear Defense Counsel, Ben Margolis, in his able presentation of this issue, base himself squarely on Judge Medina's charge to the jury in the *Dennis* case. The *bete noir's* utterance now turns up as defense gospel. Fearing a reversal under the First Amendment, that shrewd old fox Medina instructed the jury that mere advocacy of revolutionary doctrines was not enough for conviction; there had to be some evidence of words reasonably calculated to incite action. This subtle formula, which would delight a Duns Scotus but probably succeeded only further in confusing a jury already drugged by days of listening to the government expound Marxism-Leninism, was piously echoed by all the learned judges nodding affirmance on the Circuit and Supreme Courts in *Dennis* as a necessary ingredient of conviction. Only Rabelais could do full justice to this lovely legal hair. The failure of the California trial judge to split it properly may lead to a new trial and a new trial in a new atmosphere may lead to an acquittal. On such tenuous filaments doth justice hang.

I must leave until next week the similarly metaphysical arguments on which depend the *Scales* and *Lightfoot* membership cases, which were still being argued as this issue went to press. The Court seemed impressed by Telford Taylor's elo-

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The Military Feed The President A New Excuse for A Nuclear Arms Race

The "Unmentionable" Weapon Behind The H-Bomb Testing Controversy

When the President was questioned about the H-bomb at his press conference on October 5, he turned to Jim Hagerty and asked, "Is that report I got going to be published?" On getting a nod from his press secretary, Mr. Eisenhower told newspapermen "quite a long report on this whole subject" would be released that afternoon. This sounded as if a technical report had been prepared for the President. It was a surprise to the press, and perhaps also to Mr. Eisenhower, to find that the document was written as a report *by* the President. "I speak as the President," it said, with pomp, "charged under the Constitution with responsibility for the defense and security of our nation. . . ." This sounded like another instance of absentee landlordism in the White House. Who spoke through the President in that document? Whose was the pen and the decision?

The tone reflected that cult of personality nourished by the Republican high command and the military. The heart of the document was the paragraph which spoke of the President's responsibility, with the Atomic Energy Commission and the Joint Chiefs of Staff, "to weigh, at all times, the proper emphasis on various types and sizes of weapons. . . ." One could almost see Mr. Eisenhower, with Chairman Strauss and Admiral Radford—the shades securely drawn—having a look at the weapons in a White House hideaway. "This specific matter," the document had the President saying, "is manifestly not a subject for detailed public discussion—for obvious security reasons." At this, an awed electorate was presumably expected to slink away, blushing at Mr. Stevenson's uncouthness in bringing up the subject at all.

But this is too important to be left to anonymous experts drafting presidential utterances while Mr. Eisenhower putts on the White House lawn. We are not dealing here with mere "various types and sizes of weapons," as the White House release disingenuously phrased it. Mr. Stevenson has opened up the most momentous single question of our time, but even he has yet to touch upon the security-veiled inner heart of the matter. The issue of further H-bomb tests is linked with the issue of whether there shall be a world race for an intercontinental ballistic missile with an H-bomb warhead, a new terror to haunt the uneasy sleep of mankind. If there are to be no more H-bomb tests, there can be no intercontinental missile because no one can be sure whether it will work until it has been tested with its warhead.

It was no surprise that Mr. Truman disagreed with Mr. Stevenson on the cessation of tests. This, in a new context, is the same controversy which arose under Mr. Truman when the Soviets caught up with us and exploded their first atom bomb. The question which Robert Oppenheimer then ruined himself with the military by pressing was whether we should not strive for a self-enforcing agreement with the Russians against further tests or go on to the next horror, the H-bomb. Mr. Truman and the Pentagon decided for the H-bomb, as Mr. Eisenhower privately has decided for the ICBM. All those newspaper ads frantically calling for more engineers and physicists reflect a stepped up race for the Missile. Once discovered, it will be too late, every great Power will want one. The caveman mind of the military will wield a planetary club.

This is the nightmarish reality behind the deceptive phrases in the presidential release about reduced fallout and the development of devices "not *primarily* for vaster destruction." The italics are ours; the adverb is revealing. Senator Humphrey, in releasing a staff study for the disarmament subcommittee of which he is chairman, emphasized the agonizing fact that precious time ticks away. A ban on tests is self-enforcing; not only the health of mankind but its continued existence may be at stake; we can still save the air we breathe from pollution and our nights from fear of the Missile. The military, playing for time on its own, came up in the presidential release, with a new argument, as tortuous as a shyster lawyer's trying at all costs to block a contract. The document admits "tests of large weapons . . . may be detected when they occur" but what if a country secretly works on a new weapon and then tests it? This ingenious objection so triumphantly unveiled is really only another way of saying that a no-test agreement can be broken by a test. But any agreement can be broken. It will take more than one test to develop this new monster, and the price of a momentary advantage would be the ill-will and distrust of mankind.

This whole subject cries out for debate while there is time.

Last Chance

"Failure to stop production of atomic bombs in the early days following World War II has led to an arms race which is about to be duplicated in the case of the [intercontinental] ballistic-type missile. Once a nation had made a successful test of such a weapon, other countries will not rest easy until they, too, have the capability of making the weapons."

—Staff Study No. 4, Subcommittee on Disarmament, Senate Foreign Relations Committee, Oct. 7, 1956.

The Press Ignored This Criticism of Ike and Strauss By An Atomic Scientist

"I do not believe that the development of a 50-megaton weapon or a 100-megaton weapon will really make that much difference in our Sunday punch. I believe there is the element of saturation and that, to me, is the real weakness of the statement which was made [by the President] last Friday with respect to H-bomb tests. . . .

"If we are in the process of developing larger weapons than those which we presently have, then we are clearly coming much closer to the limits which we can tolerate with regard to radioactive material. . . . Its ultimate effect, when it accumulates in the bone in sufficient quantity, is to produce bone tumor and cancer. . . .

"I would like to propose that we adopt a kind of global sanitary code on atmospheric pollution, with regard to radioactive substances. . . . I would like to propose that an international limit for all nations, total, be set at ten megatons of fission product material, or its equivalent per year. . . . I believe this could be a safe limit. . . . I would prefer to have all tests cease, personally, as a citizen. . . .

"I think that the record of candor on the part of the AEC, specifically with regard to radioactive effects of weapons is a record of too little information too late. . . . Under the regime of Admiral Strauss, atomic energy has become an extremely political subject."

—Dr. Ralph E. Lapp, interviewed on CBS "Face The Nation," Oct. 7

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Dixiecrats Invade Washington While Yankees Electioneer

Set Out To Prove Negro Children "Depraved", Not "Deprived"

By Dan Wakefield

The congressional subcommittee which set itself the task of investigating the integrated public school system of the District of Columbia has concluded its hearings after nine days of public questioning with 53 witnesses. The essence of the proceeding was captured in a bit of dialogue between Rep. John Bell Timmerman (D., Miss.) and Mrs. Bessie Wood Cramer (white), director of supervision and instruction in District of Columbia Elementary schools.

Mrs. Cramer: I had not realized that little children were so seriously deprived, socially and economically, as was revealed when we saw them in the schools.

Rep. Williams: Deprived, did you say, or depraved?

Mrs. Cramer: Deprived.

Rep. Williams: Deprived?

Mrs. Cramer: Yes.

The image of Mississippian Williams, straining to hear the word he wanted—rather than the word pronounced—was a focussed image of the whole Dixiecrat-stacked committee trying to pound home the Klannish "moral" that Negro children are somehow unfit associates for white. Some teachers agreed;

Separate and Unequal

"It is not strange that the white teacher must overcome a tremendous psychological barrier when confronted with the task of teaching Negroes and white children side by side in the same classroom. But it is this very factor which should make him appreciate the magnitude of the psychological barrier facing the Negro student and to which much of his misbehavior can be attributed. Society is now paying the price for 'separate but equal.'"

—From a letter to the Washington Post, by Moddie D. Taylor.

others were not afraid to challenge it. One of the recurring scenes at the hearings was the middle aged teacher, brought up in the Dixie tradition, who showed a new awareness that poor conditions rather than racial inferiority accounted for the Negro student's lower scholastic record.

Such revelations in the testimony were no fault of the subcommittee's careful planning. Headed by Rep. James Davis (D., Ga.), a legislator credited with halting integration of D. C. firemen during the Truman era, the group was composed of six men, four of whom had signed the Southern manifesto defying the Supreme Court desegregation order. The only committeeman from north of the Mason-Dixon was a fellow from Nebraska who never made it to the hearings.

Add to this outfit the services of William E. Gerber, a Memphis lawyer and oldtime henchman of E. H. "Boss" Crump, as subcommittee counsel, and you have the distinguished and qualified board that judged the capital's two-year-old integration program. Gerber gave his credentials as a veteran minority fighter himself, born in Russia a Jew and therefore a man with "a natural inclination to be in favor of anything favoring a minority race." He told reporters he came to the hearings out of Memphis with no preconceptions about integration; although he was happy to announce once things got underway how proud he was of his own city's public schools: segregated.

The Dimensions of The Handicap

"In 1949-50 and 1950-51, the only two years for which figures are available, the D.C. school system spent $68.94 and $84.03 less to educate each negro child in average daily attendance, than was spent on the average white child. The enormity of our debt to these young Negro citizens can only be guessed at when these figures are put up against the average daily attendance figures for Negro children during the past decade, which adds up to 417,907 children."

—Gerhard van Arkel, chairman of Washington Committee on Public Schools, a group of civic and religious leaders newly formed to combat the Davis committee.

This solid Dixie contingent was unhampered by the presence of Yankees in the capital for most were busy campaigning. The Davis committee must have experienced the swooning deliciousness tasted by losing armies who come upon an undefended city by surprise. Washington lay before them, the first big city with over fifty percent Negro school enrollment to integrate, asked by the President to serve as a "model" for the rest of the country. Counsel Gerber took no chances in striking home fast, introducing in the first day's hearing a letter from a local principal who retired due to illness "directly attributable" to problems arising from integration in his high school. Washington, wrote the principal, "cannot be held out as any model to any community that has not, as yet, integrated its own system."

The Witnesses Were Pre-Sifted

It all, unfortunately, couldn't be conducted by letters, but human unpredictability was coped with by holding 500 preliminary interviews and culling from them 53 choice witnesses for the hearings. Out of the 8 school board members, only Superintendent Melvin Sharpe was called and he told the first day's session he thought integration had come about too fast. The superintendent can vote only in board ties and did not cast a ballot in the 6-1 adoption of integration. None of the other members, including three Negroes on the board, were asked to testify.

Despite the advance groundwork in selection of witnesses, the testimony was seldom as black and white as the committee might have liked. Junior High Principal Arthur Storey told of having to call the police fifty times last year to enforce order in his integrated classes. And then there was Miss Helen Masson, a faculty member at Taft Junior High for 21 years who said that integration had caused no unusual problems of discipline and that although it wasn't easy, things were "going well."

School Principal Dorothy Tripp offered without request her "wish to say that I think integration is right. If Negro men are willing to die for my liberty and so on, I'm willing to accept it. But putting it into practice is difficult. I think we need all the help we can get."

None of that help was likely to come from the Davis committee. When the hearings were over, counsel Gerber had no encouragement to offer the overworked teachers of the District of Columbia. The integrated schools of Washington, he said, were "a disgrace to the nation."

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The New Pittsburgh Trials Will Be A Chance to Smash The Informer System

J. Edgar Hoover and Brownell Disagree on Value of The Smith Act

(*Continued from Page One*)

quent argument for Scales that it ought to outlaw membership convictions altogether on the ground that Section 4 (f) of the Internal Security Act forbids conviction for being a member or official "per se" of the Communist party. Of the caviarish legal nuances in that "per se" and of the government's argument that it protects only "unknowing" or indeed unconscious members of the Communist party, more later. I will only note now how instinctively the court shuns the wide but dangerous spaces of the First Amendment for the cozy comforts in these obscure procedural and statutory casuistries. The majesty of the law seems most often upheld in its miniscule, almost illegible, footnotes.

A Hero of Our Time

There was nothing miniscule, however, in the searching interrogation by the Chief Justice of the Solicitor General which led up to the reversal of the Pittsburgh decisions, nor in the issues involved. When the mists clear, it will be seen that Steve Nelson, the leading figure in the Pittsburgh case, is perhaps the most long suffering and heroic figure of this whole witch hunt period. Despite years of persecution and slander by Congressional committee and by the crummiest bunch of local politicians and psychotic perjurers this country has seen, Nelson rose from solitary confinement in a Pittsburgh dungeon to twin victories this year in the Supreme Court, last spring against his State sedition conviction, this week against his Smith Act conviction. His real crime was his service as a political commissar in the Spanish civil war and he is to be saluted on his endurance: his counsel, Frank Donner, on his brilliant and devoted legal work. Nelson might also for his own good and his party's consider long and hard that his triumph attests that justice is still possible in this country for oppositionists whose counterparts in the Soviet Union would not have a dog's chance even today. A Soviet Steve Nelson would be lucky to reach Vorkuta alive. Socialism needs a First Amendment, too.

The Pittsburgh reversals for a new trial, the rejection 6-to-3 of the government motion to remand only for a credibility hearing on one informer, Mazzei, mark a real turn, not only as the first Smith Act reversals but as reflecting a profound disgust among both liberals and conservatives on the Court with the dirty informer system and its disingenuous apologists. Chief Justice Warren, an old time prosecutor, elicited gently but inescapably from the Solicitor General admissions that swung the Court against him. One was that the government was still prepared to defend the credibility of Mazzei's testimony at the trial. Another was the convenient theory that Mazzei had only gone wacky since the Pittsburgh trial, although as the Chief Justice emphasized over and over again Mazzei's screwball testimony about a Communist plot to assassinate McCarthy occurred in the middle of the Pittsburgh trial in 1953. The third admission was that the government proposed to present evidence partially *in camera*, i. e. at a secret hearing, "to protect people who might get hurt", i. e. faceless informers in a new guise. After that, only Frankfurter, Burton and Harlan voted for a credibility hearing; six reversed for a new trial after a short recess, probably the first reversal from the bench in the court's history. The new trial should have the widest support as a magnificent opportunity to expose the whole political informer system, and put the brakes on Smith Act prosecutions altogether.

End of A Handicap?

Even in the Supreme Court, the Department of Justice cannot resist the sly practice of trying its cases in the press. Attorney General Brownell chose the day the Supreme Court began to hear the new Smith Act appeals to issue a press release disguised as a memo to the President on the virtues of the Smith Act in suppressing Communism. But a brief amicus submitted to the Court by the American Civil Liberties Union in the Pittsburgh and California appeals discloses that J. Edgar Hoover does not agree with Mr. Brownell. It quotes Mr. Hoover's testimony to a House Appropriations subcommittee in 1953 that the Smith Act prosecution by driving the Communists underground had made the FBI's job "more difficult than it has ever been in the history of this country." It looks as if the Supreme Court is preparing to help the FBI to get rid of this handicap.

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